90-1506

Supreme Court, U.S.
FILED
MAR 28 1991
OFFICE OF THE CLERK

No.

In The Supreme Court of the United States

October Term, 1990

Kathleen Shetler Globus, Petitioner

v.

Samuel F. Skinner, Respondent

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5020 September Term, 1989
C.A. No. 85-01582

Filed Nov 30 1990
Constance L. Dupré
Clerk

KATHLEEN SHETLER GLOBUS,
Appellant

v.

SAMUEL K. SKINNER, et al.

BEFORE: Buckley, Sentelle and Thomas, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the response thereto and the reply, it is

ORDERED that the motion is granted substantially for the reasons stated by the district court in its Findings of Fact and Conclusions of Law, filed September 11, 1989, and Order, filed November 29, 1989. The merits of the parties positions are so clear as to justify summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam). We affirm the district court's conclusion regarding the agency's failure to offer appellant a position in lieu of separa-

tion solely on the ground that appellant failed to establish a prima facie case concerning the availability of such a position. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-3 (1981).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KATHLEEN SHETLER GLOBUS, Plaintiff	)	
v.	)	Civil Action
No.	)	85-1582
SAMUEL SKINNER, Defendant	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case involves an allegation of unlawful retaliation against an employee for her antidiscrimination activities, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Trial was held on April 6-11, 1989. In the findings of fact, the Court concludes that the defendant did not retaliate against the plaintiff and in the conclusions of law the Court finds in favor of the defendant.

I. Findings of Fact

The plaintiff, Kathleen Shetler Globus ("Ms. Shetler")[1], was hired in 1967 by the Maritime Administration (MarAd), an agency of the United States government.[2] She was promoted numerous times, achieving the grade of GS-13 in 1973. In 1977, Ms. Shetler was assigned to a position in the Office of Maritime Labor and Training, which was referred to as "Code 250." The head of the office was Mr. Arthur Friedberg.

During the 1970s and early 1980s, Ms. Shetler was involved in a number of equal employment opportunity ("EEO") ac-

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[1] During her employment at the Maritime Administration, the plaintiff was known as "Shetler" and she was referred to as "Shetler" during the trial. The Court will refer to her by this name in this memorandum.

[2] MarAd was within the Department of Commerce until 1980, when it was moved to the Department of Transportation, of which it is now a part. The defendant is Secretary of the Department of Transportation.

tivities at MarAd. She received from the Secretary of Commerce in 1979 a certificate in recognition for her EEO work.

One of these activities was a class action lawsuit, Harrison v. Dole, brought in 1977 by MarAd employees, alleging discrimination on account of sex and race. Ms. Shetler was deposed in June 1981 and was listed by the plaintiffs in October 1981 as a potential witness. She did not, however, testify at the trial in February 1982. By the time of the trial in Harrison, however, some employees at MarAd perceived Ms. Shetler to be an instigator or a ringleader of EEO activity at MarAd.

The plaintiff's case centers around the alleged animus toward her by Mr. Russell Stryker, associate administrator for policy and administration, who reported to Admiral Shear, administrator of MarAd.

The plaintiff and other witnesses testified that Mr. Stryker was displeased with Ms. Shetler's EEO activities and about the Harrison litigation in general. He occasionally made unfavorable comments about her to her supervisor and often mentioned her at weekly staff meetings during the Harrison litigation. The plaintiff testified that Mr. Stryker once referred to her as the "enemy" in a conversation with another MarAd employee.

The Office of Maritime Labor and Training, in which the plaintiff worked after 1977, analyzed long-term labor trends in the maritime industry, worked with the maritime labor unions, ran the U.S. Merchant Marine Academy, and operated other maritime labor programs. The plaintiff was a productive employee of the Office of Maritime Labor and Training.

MarAd was forced to make significant cutbacks in the number of its employees during the federal budget cuts of the early 1980s. For example, the agency was forced to cut the number of full time (or equivalent part-time) employees from 1249 in 1981 to 973 in 1984.

After consulting with Mr. Stryker, associate administrator for policy and administration, MarAd Administrator Admiral Shear ordered a "reduction in force" ("RIF") in 1982. He directed that much of the RIF be imposed on MarAd's Washington office and on the regional offices, in order to preserve as much as possible of the agency's shipbuilding, ready reserve fleet, and maritime subsidy activities.

Code 250 was ordered to reduce its staff from 13 to 12 employees. Admiral Shear ordered that the cut be made to co-

incide with the transfer of the agency's radar schools into private hands.

Mr. Friedberg decided that he would abolish Ms. Shetler's position, even though she had no responsibility for the radar schools. The positions of the three employees whose task it was to oversee the radar schools were not chosen for abolition. Mr. Friedberg stated that his decision was made because he concluded that the work Ms. Shetler was performing was of decreasing value to the agency.

The plaintiff testified that Mr. Friedberg, like Mr. Stryker, did not approve of the Harrison litigation and made disparaging comments about the meetings of the Harrison participants. She did not testify, however, that she heard him criticize her personally about EEO activities.

Not long before the RIF was to go into effect, however, another Code 250 employee unexpectedly resigned. Mr. Friedberg cancelled the abolition of Ms. Shetler's position, even though he did not have to do so.

Because of tightening budget constraints, however, MarAd officials by early 1983 concluded that the agency needed to decrease the number of its employes to 993 by October 1983. MarAd had 1054 employees at the beginning of 1983.

The administration and budget staff recommended another RIF to Mr. Stryker, who in turn sent a formal recommendation to Admiral Shear. In a memorandum of January 1983 to Admiral Shear, Mr. Stryker concluded that attrition would not lower the employment number from 1,054 to 993 by October 1983, and that RIF would be needed.

The Court does not accept the notion that Mr. Stryker somehow forced the idea of an unnecessary RIF on Admiral Shear. While Admiral Shear has stated that he of course preferred lowering the employment level by work force attrition rather than by a RIF, it did not appear to the administrative staff, Mr. Stryker, or Admiral Shear in early 1983 that attrition would be sufficient. Admiral Shear also stated that he preferred to abolish positions that were vacant whenever possible, instead of abolishing positions that were filled. As of early 1983, however, he believed that MarAd would have to abolish some occupied positions.

The 1983 RIF followed a pattern similar to the 1982 RIF. Once again, the regional offices and the Washington office suffered the deepest cuts, whereas the reserve fleet and Merchant Marine

Academy work force escaped relatively unscathed.

Even though MarAd implemented a general hiring freeze in 1982 that continued until 1984, the agency made exceptions in hiring8ng persons for some essential positions, such as s technicians and mechanics of the reserve fleet. The agency in July and October 1983 requested adding 29 new employees and was given permission by the Department of Transportation to hire 14. The plaintiff argues that because the agency's records and the memories of MarAd officials are not clear as to how the agency considered the effect of these 29 potential hirees on the total work force of 993, doubt must be cast on the validity of the decision to implement at RIF. The Court concludes, however, that the decfision to request 29 new hires in July and August need not have

been anticipated by MarAd officials in early 1983, when the decision to implement th RIF was made. Because of the uncertainties of attrition, emergencies, and other factors, an agency can never predict with certainty exactly how many employees it will have in the future, and thus it cannot tell with certainty how many employees it will have to dismiss in a RIF. Accordingly, the Court concludes that the uncertainty over whether the 29 potential hirees -- of which only 14 were approved -- were to be included in the total of 993 does not cause it to question the validity of decision to implement the RIF in the manner that it was implemented.

The head of the Office of Management and Organization, Mr. Mann, recommended to Mr. Stryker that Code 250 be cut by one employee. Mr. Stryker did not alter

the recommendation with regard to Code 250, and forwarded it to Admiral Shear. At trial, Mr. Mann testified that there was no specific "programmatic" reason for the cut at Code 250. Rather, such a cut was "proportionate to the average," considering Admiral Shear's preference for making most of the cuts at the Washington and regional offices.

Admiral Shear made several changes to the proposed RIF. Again following his policy of trying to preserve certain programs of MarAd, Admiral Shear altered the RIF so there would be fewer cuts at the maritime subsidy and shipbuilding programs. In return, once again, the regional offices and Washington office suffered the brunt of the cuts. For example, employment at Mr. Stryker's Office of Policy and Administration was to fall from 182 to 147.

The defendant also presented evidence that Admiral Shear himself made the decision to increase from one to two the number of persons in Code 250 to be laid off by the RIF. This change is reflected in a handwritten alteration to Mr. Stryker's proposal. Mr. Mann, Mr. Stryker, and Mike Myrtle each testified that it was Admiral Shear's handwriting; indeed, only Admiral Shear was authorized to make such a change. The Court concludes that the change was made by Admiral Shear's hand and that he, without Mr. Stryker's instigation, made the decision to increase the cut at Code 250 from one to two.

The Court rejects the plaintiff's contention that Mr. Stryker instigated either the RIF, the increase in Code 250's share of the RIF, or both, as a way of targeting Ms. Shetler for dismissal.

The plaintiff does note correctly that a number of key personnel in the RIF decisionmaking process reported to Mr. Stryker -- Mr. Mann, head of the Office of Management and Organization, Mr. Turanin, acting head of the Office of Personnel, and Mr. Earnest Hawkins, head of the agency's EEO office -- and that Mr. Stryker essentially was their conduit to Admiral Shear.

The decision to cut two positions from Code 250 appears to have been a reasonable one. The Office of Maritime Labor and Training performed some work that was less than essential; a report from Mr. Friedberg a few months earlier predicted delays and the abandonment of certain projects but no dire consequences if there was to be a RIF of up to three employees of Code 250.

After being informed that he would have to cut two of his employees and after seeing his protests go unheeded, Mr. Friedberg was faced with the choice of whom to lay off in his office. In making his decision, Mr. Friedberg analyzed the functions of his office and his dozen employees. He determined that the job performed by Ms. Shetler, although useful, was the least essential of the positions.

Ms. Shetler worked in five broad areas, Mr. Friedberg concluded, three of which occupied most of her time. First, she organized meetings concerning the Merchant Marine Academy Advisory Board and the Congressional Board of Visitors. Mr. Friedberg concluded that this function could be done by academy personnel. Second, Ms. Shetler monitored maritime labor legislation. This consisted primarily of following the proposed amend-

ments to the Longshore and Harbor Workers' Compensation Act; after enactment of the amendments the responsibility for oversight was shifted away from the agency. Third, Ms. Shetler planned mobilization for the merchant marine fleet.

In addition to these three major functions, Ms. Shetler also performed "ad hoc activities" -- such as revision of the federal maritime regulations -- and made studies in the area of shipyard labor. Mr. Friedberg concluded that there would be less need for shipyard studies as the agency withdrew its support of shipyards and as the government phased out the construction differential subsidies that had ben paid out to support American shipbuilding.

Because he determined that much of the functions that she had performed were no longer going to be necessary, Mr.

Friedberg concluded that the job held by Ms. Shetler was the least essential of the positions at his office, and that abolition of the position would be the least disruptive of the work of the office and the agency. The Court concludes that th reasons offered by Mr. Friedberg for his decision to eliminate Ms. Shetler's positions were bona fide.

The Court also determines that Mr. Friedberg did not eliminate Ms. Shetler's position in whole or in part because of animus arising out of her EEO activities.

The fact that Mr. Friedberg consistently rated Ms. Shetler highly as an employee during her six years at Code 250 is not strong evidence that his decision to lay her off in the 1983 RIF was the result of retaliation. Indeed, if Mr. Friedberg had wanted to retaliate against Ms. Shetler, who had performed a number

of EEO activities by 1979, he could have done so through poor evaluations. Rather, Mr. Friedberg's actions were more consistent with a supervisor who found Ms. Shetler a productive employee but who determined that her positions was the least essential at Code 250.

In addition, Mr. Friedberg's discussions with the plaintiff before 1983 regarding the vulnerability of her position to a RIF are more consistent with their express purpose -- to have the plaintiff's job restructured in order to minimize her exposure to a RIF -- than with the suggestion that Mr. Friedberg had pre-selected Ms. Shetler for a RIF or wanted to remove some aspects of her job. Ms. Shetler did not want to be reassigned to any of the other positions in the office that Mr. Friedberg suggested; ac-

cordingly, Mr. Friedberg did not change Ms. Shetler's job description.

The Court also rejects the suggestion that Mr. Friedberg showed retaliatory intent by his failure to lay off in 1982 any of the three male employees who worked with the radar schools, which were being privatized. Mr. Friedberg concluded that the privatization would result in more work for his office in the short run. In any event, it is also worth noting that Ms. Shetler was not laid off in the 1982 RIF; when another employee resigned, Mr. Friedberg contacted the personnel office and told it to cancel the RIF notice to Ms. Shetler, something that he did not have to do and something that he could have done if he truly harbored a desired to lay off Ms. Shetler because of her EEO activities.

In addition, the plaintiff contends that the defendant showed retaliatory intent in 1983 by failing to offer Ms. Shetler a GS-6 typing job in lieu of dismissing her entirely. She notes that her government job application stated that she was fairly proficient at typing. Under civil service rules, the defendant did not have to offer her the typing job. The plaintiff argues that if her supervisors did not have retaliatory intent, they would have offered her the typing position. The Court disagrees, noting the obvious managerial problems that would likely arise if an employer were to demote a high-level employee to a typing job. It is also worth noting that Ms. Shetler was offered a typing position when it appeared that her job would be abolished in the 1982 RIF -- action that would appear inconsistent with the con-

tention that the 1982 RIF was the defendant's first attempt to remove Ms. Shetler.

Furthermore, the plaintiff contends that the defendant showed retaliatory intent by failing to have Ms. Shetler "bump" another employee. Instead, the positions of the one employee that the plaintiff could have "bumped" also was abolished in the 1983 RIF. The plaintiff suggests that this was done in order to avoid having Ms. Shetler take the position. The Court concludes, however, that there is no reason to believe that the action was taken for a reason other than the one stated by the defendant -- that the position was chosen for abolition because it was more expendable than other positions.

Finally, the Court concludes that Mr. Friedberg's personnel decisions after

the plaintiff was laid off in the 1983 RIF do not show that he had purposely targeted Ms. Shetler for the RIF. For example, the plaintiff maintains that Mr. Friedberg gave preferential treatment to Mike Ercole, who had no involvement in EEO litigation and who also was designated for separation through the RIF. The Court concludes, however, that Mr. Ercole was not separated until after the plaintiff because of his veteran's preference status.

II. Conclusions of Law

Claims of unlawful retaliation against an employer for protected antidiscrimination activity, pursuant to section 704(a) of the Civil Rights Act of 1964 (codified at 42 U.S.C. § 2000e-3(a)), follow the same framework as more traditional Title VII claims. McKenna v. Weinberger, 729 F.2d 783, 790 (D.C. Cir. 1984) (citing McDonnell Douglas Corp. v. Green, 411 U.S., 792 (1973), which set forth the framework for proving a Title VII claim). A plaintiff must first establish a prima facie case of retaliation by showing: (1) that she engaged in protected activity; (2) that the employer took adverse action against her; and (3) that there is at least an inference of a causal connection between the two. McKenna, 729 F.2d at 790. An activity is protected if it involves oppos-

ing alleged discriminatory treatment by the employer or participating in legal efforts against the alleged treatment. 42 U.S.C. § 2000e-3(a). A prima facie case, which traditionally is fairly easy to establish in a Title VII case, may be made in a retaliation case merely through circumstantial evidence that an adverse employment action was taken against the plaintiff not long after she participated in protected activity. Mitchell v. Baldridge, 759 F.2d 80, 86 (D.C. Cir. 1985).

Once a prima facie case has been made out, the burden shifts to the defendant to articulate a legitimate, nonretaliatory reason for the adverse employment action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). If this is done, the plaintiff may then try to prove that the

articulated reason was actually a pretext for unlawful retaliation. Chen v. GAO, 821 F.2d 732 (D.C. Cir. 1987). The ultimate burden of persuasion in proving retaliation remains with plaintiff. Burdine, 450 U.S. at 256.

A plaintiff may also prevail in a Title VII case by using new frameworks of proof developed by courts in recent years to supplement the tradition McDonnell Douglas path. First, a plaintiff may prevail if she fully discredits the defendant's stated nonretaliatory reason, even without showing any direct evidence of discrimination. King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1986). Second, when a plaintiff has established that the defendant's decision was based in part on an improper motivation and in part on a legitimate reason, the employer has the burden of proving "that its legitimate

reason, standing alone, would have induced it to make the same decision": Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 1792 (1989) (Brennan, J.). The employer may prevail if it convinces the Court of this by a preponderance of the evidence. Id. In Price Waterhouse, one justice wrote that when the plaintiff has established the existence of improper motivation, the Court should state whether its analysis then proceeds under the McDonnell Douglas or the Price Waterhouse framework. Id. at 1805 (O'Connor, J., concurring).

In the instant case, the Court concludes that the plaintiff succeeded in making out a prima facie case of retaliation. Although the defendant points out that it was nearly two years between the plaintiff's last overt activity in the Harrison litigation and her separation,

see, e.g., Clark v. Chrysler Corp., 673 F.2d 921, 930 (7thy Cir.) (two years between protected activity and adverse action is too long to establish a prima facie case of retaliation), cert. denied, 459 U.S. 873 (1982), the Court believes that the two-year period is a slightly misleading figure in this case. Although the last time the plaintiff participated in Harrison was by giving a deposition in June 1981, she was on the list of possible defense witnesses in late 1981. Moreover, because Harrison did not go to trial until early 1982, it would be reasonable to assume that any animosity kindled by the litigation would not abate until well into 1982. Finally, it is notable that the plaintiff was first told that she would be laid off in the 1982 RIF only a few months after the trial in Harrison, even though this notification

was later canceled. Because the date of the first RIF certainly was close enough to make out a prima facie case of retaliation, the Court believes that the fact the plaintiff was laid of in the next RIF also is enough to establish a prima facie case.

Moreover, even if the plaintiff's discussions with the active members of the Harrison litigation were not protected activity -- and the Court does not need to decide whether they were -- the fact that the plaintiff maintained contact with these employees makes it more reasonable to infer the possibility of retaliation against her in 1983.

Finally, the plaintiff helps prove a prima facie case of discrimination by citing negative comments by Mr. Stryker and Mr. Friedberg regarding EEO activities. Although the officials did not

take any adverse action against the plaintiff when they made the comments, the statement themselves help connect the plaintiff's EEO activity and her dismissal enough to help establish a prima facie case.

The Court also concludes, however, that the defendant articulated legitimate, nonretaliatory reasons for dismissing Ms. Shetler in the 1983 RIF and that the plaintiff failed to prove that these reasons were pretextual. In doing so, the Court notes that it uses the traditional McDonnell Douglas framework, instead of the Price Waterhouse path. See Price Waterhouse, 109 S. Ct. at 1805 (O'Connor, J., concurring) (stating when a court should use each framework). It does so because the plaintiff, in the Court's opinion, failed to prove that the defendant had a "dual motive" -- retalia-

tion and a valid reason -- for taking adverse action against the plaintiff. The conclusion that the plaintiff has met the relative low burden of making out a prima facie case of retaliation by establishing an inference of retaliation is not the same as establishing that the defendant actually had a retaliatory motive in dismissing the plaintiff. In the instant case, the agency provided solid nonretaliatory reasons for the actions that it took, and the plaintiff failed to convince the Court that these reasons were pretextual, or even that retaliation was part of the agency's reasons for taking action against the plaintiff.

As stated in the findings of fact, the Court rejects the plaintiff's allegations that either Mr. Stryker or Mr. Friedberg manipulated the RIF process in order to have Ms. Shetler dismissed.

While it is true that Mr. Stryker and Mr. Friedberg expressed displeasure by EEO work and disagreed with Ms. Shetler over whether she was spending too much time on EEO activities, this fact does not overcome the showing by the defendant that the decisions to implement the RIF and to abolish Ms. Shetler's position were made for sound administrative and personnel reasons. As stated in the findings of fact, the Court is convinced that the nonretaliatory reasons given for the dismissal of Ms. Shetler were the true and only reasons for her dismissal.

The agency decided to implement the 1983 RIF because of the requirement of personnel cuts and the reasonable prediction that attrition would not lower the number of employees to the level that the agency wanted in 1983. The recommendation of a RIF originated below Mr.

Stryker and was approved by Admiral Shear. The plaintiff has failed to convince the Court that the RIF was urged by Mr. Stryker as a way of getting to Ms. Shetler. The plaintiff failed to discredit the stated reason for the RIF, failed to prove that it was pretextual, and failed to prove that the agency's decisionmakers took into account retaliatory motives at all in deciding to implement the RIF. The plaintiff did show that the agency did not necessarily take into account in its calculations the fact that it would seek approval for 29 new emergency hires in 1983. This fact does not, however, discredit the reasons for the RIF, establish that they were pretextual, or prove that they were motivated even in part by a retaliatory motive.

In addition, the Court concludes that the agency showed valid reasons for

the decision to dismiss employees from the plaintiff's offices. While the plaintiff showed that the agency had no "programmatic" reason for making cuts in the Code 250 office, the Court notes that an agency cannot be required to have a specific reason for cuts at each office during an agency-wide RIF. The fact that an agency-wide cut is desired is, almost by definition, enough. It is clear that Admiral Shear wanted the cuts to fall primarily on the regional and Washington offices. It is also clear that the cuts suffered by Code 250 were not extraordinary; indeed, they were less severe than those suffered by other offices. Finally, it is clear that the handwritten increase in the number of cuts at Code 250 from one to two was made in Admiral Shear's hand; there is no evidence that Mr. Stryker pushed for this change to his

own proposal. In sum, the plaintiff failed to discredit the defendant's reasons for the cuts to Code 250, failed to prove that they were pretextual, and failed to prove that the agency was motivated even in part by a retaliatory motive.

Finally, the Court concludes that the agency established a solid and undiscredited rationale for the decision to abolish the plaintiff's position in the RIF. Mr. Friedberg concluded that, although the plaintiff was a valued worker, most of her job functions either could be done by other persons or were decreasing in importance as MarAd's functions changed. The plaintiff again failed to prove that these stated reasons were not the true ones. The Court's conclusion is not swayed by the fact that the plaintiff, a high-level official at the time,

was not offered a GS-6 typing position, nor by the fact that the one position occupied by an employee that the plaintiff was entitled to "bump" also was abolished. Again, the Court does not believe that the plaintiff either discredited the stated reason for the decision to abolish the plaintiff's position, proved that the stated reason was pretextual, or that the agency was motivated even in part by retaliatory motives.

In conclusion, the Court notes that when a plaintiff establishes in a retaliation case that her supervisors at one time expressed animosity toward her EEO activities, the Court must examine with the closest scrutiny the employer's stated reasons for the adverse action taken against the employee. On the other hand, when the employer has compelling nonretaliatory reasons, the plaintiff

cannot shield herself from adverse action merely because of the earlier expressions of animosity. In the instant case, the plaintiff failed to prove that Mr. Stryker conjured up a RIF in the hope that Ms. Shetler would be dismissed, or that Mr. Friedberg used the opportunity of the RIF to fulfill a retaliatory urge by abolishing Ms. Shetler's position, or that Mr. Stryker and Mr. Friedberg conspired to eliminate the plaintiff's job. The Court concludes that the agency proved that its actions were taken because of legitimate, nonretaliatory reasons. The Court finds no liability under Title VII.

9/11/89 /s/ George H. Revercomb
Date George H. Revercomb, Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KATHLEEN SHETLER GLOBUS, Plaintiff v. No. SAMUEL SKINNER, Defendant	)	Civil Action 85-1582 ORDER

This case involves the alleged unlawful retaliation against an employee for her antidiscrimination activities, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Trial of the action took place in April 1989 and judgment in favor of the defendant was ordered in September 1989. In reaching its decision, the Court determined that plaintiff's termination was due to a bona fide reduction in force

("RIF"). The decision to eliminate plaintiff's position was not due "in whole or in part because of animus arising out of her EEO activities."

Plaintiff now asks the Court to reconsider its earlier ruling and to award judgment in favor of plaintiff, claiming that defendant violated Title VII by failing to offer plaintiff a clerical positions at GS level 6 upon the elimination of her GS 13 job. Having considered plaintiff's motion to alter judgment, the legal memoranda and exhibits submitted by both parties and the files and records in this action, IT IS HEREBY ORDERED, that plaintiff's motion to alter judgment is DENIED.

Plaintiff failed to present a prima facie case of retaliation with respect to her claim that defendants failed to offer her a GS 6 clerical vacancy.[1] There is no evidence that such a clerical position was available.[2] Plaintiff points only to the general testimony that one of the four clerical positions exempt from the 1983 RIF was vacant at the time of plaintiff's termination. Plaintiff then asks the Court to "infer that the [defendant's] office had determined that that vacancy was going to be filled." The Court will not indulge plaintiff in this inference. Ms. Globus and her coun-

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[1] A prima facie case establishing retaliatory termination is different that the case alleging defendant's improper failure to offer alternative employment in the midst of a bona fide reduction in force. The plaintiff who claims that an employer failed to offer her another job must show, as part of her prima facie case, that such a position was available.

[2] The parties also dispute whether plaintiff had the adequate skills for such a position even if one had been available.

sel had the opportunity to develop direct testimony regarding the alleged vacancy at trial. In the absence of such evidence, this Court will not "infer" an essential element of plaintiff's case after trial.

Furthermore, even if plaintiff had succeeded in establishing a prima facie case, plaintiff has not proved that defendant's reasons for failing to offer plaintiff a clerical position were merely pretextual. This Court has already found that the defendant articulated legitimate reasons for its dismissal of Ms. Globus. Defendant needed to eliminate plaintiff's job as part of a general reduction in force and, as all parties agree, defendant had no obligation to offer plaintiff another position. Defendant reasonably believed that plaintiff would not accept a lower clerical position since she had

previously rejected a similar demotion when faced with termination resulting from a reduction in force in 1982. Defendant also introduced testimony that indicating that demotion of a relatively high level employee, such as plaintiff, to the level of GS 6 would create obvious managerial problems.

Having found that defendant articulated legitimate reasons for the termination of Ms. Globus, the Court then thoroughly evaluated plaintiff's claims that her dismissal was retaliatory. After examining all of the evidence, the Court found that plaintiff failed to show that the agency's reasons for dismissal were pretextual or that the agency was motivated in any way by retaliatory reasons to take action against the plaintiff. Nothing in plaintiff's recent motion changes this determination, nor does

plaintiff argue that defendant's conduct was in fact retaliatory.

Accordingly, we see no reason to change this Court's order of September 12, 1989. Plaintiff's motion to alter judgment is DENIED.

11/21/89 /s/George H. Revercomb
DATE UNITED STATES DISTRICT COURT
JUDGE GEORGE H. REVERCOMB

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5020 September Term, 1989
C.A. No. 85-01582

Filed Aug 13 1990
Constance L. Dupré
Clerk

KATHLEEN SHETLER GLOBUS,
Appellant

v.

SAMUEL K. SKINNER, et al.

BEFORE: Buckley, Sentelle and Thomas, Circuit Judges

O R D E R

Upon consideration of appellant's Petition for Rehearing, filed October 10, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: \s\ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Tr. 21

QUESTION: Based on statements that Mr. Stryker made directly to you or in your presence, do you know whether Mr. Stryker considered some people in the agency to be his enemies?

CAPT. WHITCHER: This was a remark which he made fairly commonly and although at first I thought this was a joking reference I came to feel that he was serious about problems that he was having with other associate administrators and other officials.

QUESTION: Are you personally aware of Mr. Stryker making decisions based on statements by him of animosity towards particular people?

CAPT. WHITCHER: I recall one instance very, very clearly, because it was the first time that I really was shocked at an action taken by Mr. Stryker. Mr. Stryker called me into his office. There was another associate administrator in the office. This associate administrator outlined to me certain changes in the physical arrangement of his office and its location. Mr. Stryker asked me could this be done. I said it could. Mr. Stryker said, "when can you do this?" And I said, "I will get to it just as soon as I leave this office."

The associate administrator left the office and I said, "I'll be on this this morning." He said, "Don't you do a thing."

Tr. 22

QUESTION: Who said, "Don't you do a thing?"

CAPT. WHITCHER: Stryker said, "Don't do a thing." He said, "That man is an enemy of ours."

QUESTION: Do you know the extent to which Mr. Stryker would quickly forgive his enemies or forget the grounds of animosity?

CAPT. WHITCHER: To the best of my knowledge, he never forgave anybody anything.

* * *

THE COURT: He said he didn't think that he would ever forgive anybody for anything they did adverse to him. He held a grudge a long time, I guess.

* * *

QUESTION: Did you ever hear Mr. Stryker use the term, and I quote, "women's lib?"

Tr. 23

CAPT. WHITCHER: Yes, indeed.

QUESTION: And do you recall his mentioning this term or using this term in connection with any particular employees in the agency?

CAPT. WHITCHER: At a time that a class action suit was instituted by certain employees of the Maritime Administration,

in connection with women and blacks, he was very, very much concerned about I think what he considered extremities of women in the women's lib movement.

QUESTION: Did he say anything that leads you to that belief?

CAPT. WHITCHER: Yes, indeed, he just thought that the women were on the wrong track.

QUESTION: Was Ms. Shetler's name mentioned in this connection by Mr. Stryker?

CAPT. WHITCHER: Mr. Stryker was very much concerned about the fact that Ms. Shetler, he said, was one of the instigators of this suit.

THE COURT: You're talking about the class action?

CAPT. WHITCHER: Of the class action.

QUESTION: How often was there discussion at the senior staff meeting of this class action lawsuit?

CAPT. WHITCHER: Well, this class action process went on for a long period of time. Mr. Stryker would mention this at virtually every one of his staff meetings with increasing concern about all of the problems that this was causing for him and for the Maritime Administration and so on and so forth.

Tr. 24

QUESTION: And to what extent was Ms. Shetler's name used in these staff meetings?

CAPT. WHITCHER: Her name came up all the time.

QUESTION: In what context?

CAPT. WHITCHER: In the context that she was the ring leader in this class action suit.

Tr. 30

QUESTION: To your knowledge, did Mr. Stryker involve himself in the personnel decision making of all of his office directors?

CAPT. WHITCHER: Yes he did. . . .

QUESTION: Well, other than office directors though, Mr. Whitcher, did Mr. Stryker involve himself in lower-level positions, GS-11s, GS 12s, clerk typists?

CAPT. WHITCHER: Yes, he did.

QUESTION: For all of the hundreds of people under him, is that your testimony?

CAPT. WHITCHER: I wouldn't say for everyone of the hundred people under him, but when certain positions became vacant, such as a position in the correspondence control organization, under Mr. Flanagan, then Mr. Stryker was very active in con-

sidering how vacancies would be filled or changes would be made.

Tr. 51-52

QUESTION: And you also looked at Ms. Shetler, is that correct?

MR. FRIEDBERG: That's correct.

QUESTION: And you decided that hers was the position that you could best do without, is that correct?

MR. FRIEDBERG: That is correct.

QUESTION: Now, this was not a matter of it being a useless function, was it? This was not something you were trying to get rif of for a long time, was it?

MR. FRIEDBERG: Not at all.

QUESTION: She was a valued member of your staff?

MR. FRIEDBERG: She was very good. She was a good worker. We had good working relationships. She was performing functions that were good functions for the agency.

Tr. 81

QUESTION: Generally, during the time she was in your office, were you satisfied with her work performance?

MR. FRIEDBERG: Yes.

QUESTION: Do you recall what ratings you gave her during that period?

MR. FRIEDBERG: Well, they were always more than just satisfactory. There were commendables and outstandings.

Tr. 106

QUESTION: Can you waive qualifications in order to let Ms. Shetler or anyone else bump another employee?

MR.TURANIN: No. No you cannot.

QUESTION: Can you waive qualifications in order to let an employee be assigned into a vacancy?

MR. TURANIN: That's permissible, yes.

Tr. 123

QUESTION: Back in 1982 Ms. Shetler had -- you had determined that Ms. Shetler was qualified to bump an employee named Watson, is that correct?

MR. TURANIN: Yes.

QUESTION: And Ms. Watson was a GS -- series 3003, grade 6 employee with the job title of "Supply Service and Procurement Assistant (Typing), " is that correct?

MR. TURANIN: Yes.

* * *

QUESTION: Ms. Shetler's personnel folder show that the greatest speed she claims is 25 words per minute, is that correct?

MR. TURANIN: I don't recall her personnel folder demonstrating that she had any typing skills.

QUESTION: Did you review her personnel folder in determining whether she could bump Ms. Watson?

MR. TURANIN: Did I review her folder?

QUESTION: Yes.

MR. TURANIN: I don't recall whether I reviewed it at that time or whether one of the RIF members reviewed it, but it would have been reviewed, yes.

Tr. 125

QUESTION: A RIF member meaning someone on your staff.

MR. TURANIN: Yes.

QUESTION: And whoever it was did determine that Ms. Shetler was fully qualified for this supply service job?

MR. TURANIN: I would say "qualified."

QUESTION: Well, sufficiently qualified to bump somebody else?

MR. TURANIN: Yes.

QUESTION: And you didn't offer that particular job to Ms. Shetler, is that correct?

MR. TURANIN: That is correct?

QUESTION: You offered another job with "(Typing)" in it, a mail clerk typing?

MR. TURANIN: Correspondence clerk, I believe it was.

QUESTION: Correspondence clerk typing?

MR. TURANIN: Yes.

QUESTION: And Ms. Shetler accepted that job?

MR. TURANIN: Yes.

Tr. 328

MR. MANN: The 993 positions that were selected for retention were viewed as the high-priority vacant positions and, to the extent that those positions were not filled, there were requests for filling those positions, since they were within the high-priority 993.

At the time of the reduction in force, when there were 962 employees onboard, there were remaining 31 high-priority positions. Those high-priority positions were so high that Admiral Shear had requested exemptions to the hiring freeze to fill 14 of them in July of 1983 and would later request exemptions to the hiring freeze to fill virtually all the remaining ones.

QUESTION: Now, in that regard, Mr. Mann, let me call your attention to defendant's exhibit 4.

THE COURT: That doesn't explain your question. It doesn't explain it to the court. How does that explain why the 962 is the -- if you are only required to have 992 and you come up with 962, how does that explain that you aren't riffing more than you have to.

Because the head of the agency wants to give priority to some, what does that have to do with it? I don't understand you. Maybe it's my fault, but I don't understand what you mean.

Tr. 281

MR. MANN: The reduction was designed to retain the highest priority 993 positions. People who were not retained after the RIF were not occupying positions that had been selected for retention.

THE COURT: Well, that doesn't explain why they were if you had 992. You had a ceiling of 992, is that correct?

MR. MANN: A position ceiling of 993, yes, sir.

THE COURT: 993. Regardless of whether they were skilled, high-priority, or anything else. It was 993, is that correct?

MR. MANN: Positions, yes, sir.

THE COURT: And you end up with 962?

MR. MANN: Employees.

THE COURT: Explain to me again then why you didn't RIF more than you had to.

MR. MANN: Because the office directors, at the request of the administration, had identified those positions that they wanted to retain, they considered so important.

THE COURT: That's included in the 993.

MR. MANN: Yes, sir, and those position --

C: So, they were retained.

MR. MANN: They were retained and they were vacant as of the date of the reduction in force.

THE COURT: They were vacant as of that date. So, the idea being is that that's how you get down to 962 plus the priority positions. It's 962 plus the unfilled positions?

Tr. 282

MR. MANN: Yes, sir.

THE COURT: Well, thank you.

* * *

Tr. 306

QUESTION: Looking at Defendant's Exhibit 4, there is, first of all, a set that's dated July 12. These positions seem primarily to be in the Merchant Marine Academy and some of the Western Region, is that correct, the James River Reserve Fleet.

MR. MANN: Yes, as I'm looking at them

QUESTION: It is my understanding, also, although I couldn't figure it out at lunch, that if we look at each of the individual sheets, it should come up to a total of 14 positions?

Tr. 307

MR. MANN: I'm not sure that they are all here, but there were 14 memoranda sent to the department. I'm sorry, 12 memoranda requesting 14 exemptions is the way it is put in Dr. Fairman's memoranda.

* * *

QUESTION: Then the October 25th group of documents has 15 positions.

MR. MANN: Yes.

QUESTION: Of which 10 are in the James River Reserve Fleet and the others are elsewhere in the regions?

MR. MANN: Yes. And there's a communications specialist for code 310 there, as well.

* * *

QUESTION: Let me show you -- these 10 or these 15 positions also should correlate. These are after the RIF. They should correlate with the number of vacancies in the appropriate organizations, is that correct?

MR. MANN: They would represent part of the vacancies not necessarily all of the vacancies.

QUESTION: I show the witness Plaintiff's Exhibit 310 and ask him first of all if he recognizes this as a document produced by Mr. Turanin.

MR. MANN: It looks like something that Mr. Turanin produced, yes.

QUESTION: It indicates, as I read it, that the code 220, which is the office of chief counsel, is under ceiling by three positions?

MR. MANN: That's right.

QUESTION: Were any of the high-priority positions among those?

MR. MANN: Yes.

QUESTION: Which were they?

MR. MANN: There were three attorneys at that time -- three attorney positions, including the chief counsel.

QUESTION: And that's in the documentation we have here?

MR. MANN: Those positions had not been requested for exemptions from the hiring freeze, at that point.

QUESTION: Well, as far as the document we have, the evidence, are those three positions among the exemption requests that have been produced for us?

Tr. 309

MR. MANN: Not yet, no, they have not.

QUESTION: And code 340 is one under ceiling. Do you recall what the high-priority exemption request for that office was?

MR. MANN: It's referred to here as a computer specialist, GS-13 as the vacancy.

QUESTION: Well, was that a high priority position for which you were requesting exemption?

MR. MANN: I don't know if that particular position was requested, but it was one of the remaining 993 positions.

QUESTION: The answer is, you do not recall whether it's one of those for which it was important enough to seek an exemption, is that correct?

MR. MANN: I don't know.

QUESTION: Well, let me ask you to look again at Defendant's Exhibit 4 and tell me if it's one of those which is covered by Defendant's Exhibit 4.

MR. MANN: (Perusing documents.) As I'm going through it here I don't see that position but it was one that could have been requested as an exemption to the hiring freeze.

QUESTION: Yes. And code 360-R that's a clerical reserve, is that correct?

MR. MANN: Yes.

QUESTION: What grade level are those employees, do you know?

MR. MANN: They are typically clericals, GS-4, 5 and 6.

QUESTION: And that area is shown as one under ceiling. Do you recall whether an exemption was requested in order to hire a GS-4, or 5, or 6 clerical employee?

Tr. 310

MR. MANN: No, I don't.

Pl. Exh. 274
[excerpts]

p. 18-19

PLAINTIFF'S FOURTH INTERROGATORY No. 20(a): In the 1982 or 1983 reduction in force was any employee offered a vacancy even though he or she had not been determined to be entitled to displace an employee at or below the grade of that vacancy?

RESPONSE: Yes. It is MarAd's policy to offer authorized vacancies to employees whose positions would be affected by RIF, provided they meet the qualifications requirements for those vacancies.

Def. Exh. 3
[excerpts]

2. A personnel action freeze was implemented on July 1, 1983. Vacancies could not be filled after that date unless employees who were scheduled to be affected by RIF were selected for those vacancies. There were successful placements; for example, Code 500 agreed to make offers to vacant positions to 4 employees who would either have bumped other employees or who would have been separated by RIF. Other vacancies were filled in the same manner.

* * *

9. We continue to make referrals to other organizations and, of course, to make every effort to place affected employees within MARAD.

Def. Exh. 6
[excerpts--
vacancies offered in HQ]

GS-9	Thomas, P.	GS-7 Secty (Steno)
GS-11	Bryant, Memphis	GS-8 Trade Route Asst
GS-14	Ledbetter, Roscoe	GS-13 Contract Spec
GS-7	Higbee, Ann	GS-6 Secty-typing
GS-7	Watson, Carol	GS-5 Accountant
GS-6	Hawkins, Beverly	GS-6
GS-4	Byers, Cheryl	GS-4 Clerk-typist
GS 9	Isaac, Joyce	GS-6 Secty (Steno)
GS 12	Foltz, Alvin	GS 4 Clerk Typist
GS 7	Washington, Y	GS 6 Subs Rate Asst
GS 12	Laprade, Rona	GS 6 Secty (Typing)
GS-14	Faruki, John	GS-4 Clerk Typist

Def. Exh. 18
[excerpts]

Date: April 16, 1982

ACTION: Civilian Hiring Freeze

From: The Deputy Secretary

In order to place the Department of Transportation (DOT) in the best possible posture to adapt to changing resources and programs, the Secretary is establishing, effective close of business today, a Department-wide freeze on outside civilian hiring. This freeze includes all hires of persons from outside DOT on a full-time permanent or part-time permanent basis, including transfers from other Federal agencies. Commitments made by authorized officials prior to the issuance of this memorandum will be honored.

The exemptions to this freeze are as follows:

1. Personnel actions resulting int he movement of employees within the Department. . . .

* * *

Stipulations (Jt. Exh. 1)
[excerpts]

¶ 32. Significant dates in the Harrison litigation include the following:

complaint filed with agency	8/77
complaint filed in court	7/79
Shetler affidavit filed	2/80
* * *	
Pre-trial briefs filed (plaintiffs' brief lists Shetler as witness)	10/81
Second Friedberg deposition taken	2/82
Trial	2/82
Findings of Fact and Conclusions of Law	6/82
Final injunction	3/83

¶ 70. Attrition reduced actual employment to 994 by the end of June, 1983.

¶ 71. Attrition reduced actual employment to 984 by September 25, 1983.

¶ 72. The effect of going through with the reduction in force was to reduce actual employment as of October 1, 1983, to 956.

Appellee's Reply [to Appellant's Opposition to Motion for Summary Affirmance]
[excerpts]

p. 4

Moreover, the decision whether to fill a vacant position lay not with Mr. Turanin, but rather with Jack Mann, the manager who had the vacancy.

* * *

Although the existence of a clerical vacancy is uncontradicted, at least four

p. 5

other points, critical to appellant's case were in dispute: 1) whether MARAD requested an exemption from the hiring freeze to fill the position; 2) whether appellant was a qualified typist; 3) whether appellant was entitled to the position; 4) whether the failure to offer appellant the position was due to an illegal, retaliatory motive.